United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2161

To be argued by
PHYLIS SKLOOT BAMBERGER

B/P

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FELIX CASTRO,

Petitioner-Appellant,

-against-

EUGENE LeFEVRE, Superintendent,

Respondent-Appellee.

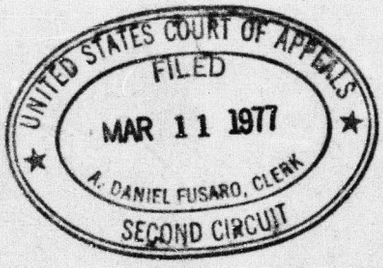
Docket No. 76-2161

B

P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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FOR THE SECOND CIRCUIT

FELIX CASTRO, Petitioner-Appellant, -against- EUGENE LEFEVRE, Superintendent, Respondent-Appellee.	Docket No. 76-2161

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether appellant's sentence as a second felony offender was imposed in violation of due process and therefore must be vacated.

Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant) entered on September 30, 1976, denying a petition for writ of habeas corpus seeking to vacate the sentence imposed pursuant to a conviction rendered in the Supreme Court of the State of New York, Bronx County for robbery in the first degree.

The district judge granted a certificate of probable cause (see Record on Appeal, Doc. No. 7) and this Court assigned The Legal Aid Society, Federal Defender Services Unit as counsel on appeal.

Statement of Facts

In his petition for writ of habeas corpus appellant alleged that the proceedings at which he was adjudicated a prior felony offender and then sentenced were unfair so as to deprive him of due process under the Fourteenth Amendment.

A. The Plea

On March 14, 1974, appellant pleaded guilty to robbery in the first degree to cover an indictment (2966/73) which also charged possession of a weapon as a misdemeanor, robbery in the second degree and criminal possession of stolen property. The plea also covered another indictment. On the record it was

indicated that although robbery in the first degree was a "B" felony, appellant would be sentenced as a "C" felon. (Minutes of plea, attached as Exhibit B to state's affidavit in opposition which is Doc. No. 5 to Record on Appeal.) The judge advised appellant that as a C felon he could be sentenced to up to fifteen years in prison.* Appellant stated he had spoken to his lawyer about the case. He also stated the only promise made to him was that he would be sentenced as a C felon. Appellant then entered his plea of guilty to robbery in the first degree.

B. The Sentence**

At the beginning of the sentencing procedure the Assistant District Attorney advised the judge of the agreement to sentence appellant as a C felon.

The judge then stated: "Wait a minute, now. Is he a predicate felon?" The Assistant District Attorney responded affirmatively and stated he had served the papers -- presumably this meant the multiple felony offender information -- necessary to trigger the second felony procedure. Both defense counsel and

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*A C felony requires a maximum sentence of three to fifteen years in custody, (McKinney's N.Y. Penal Law §70.00(2)), and a minimum sentence of one year up to one-third of the maximum sentence imposed (McKinney's N.Y. Penal Law §70.00(3)).

**The minutes of sentence, annexed as Exhibit C to the state's affidavit in opposition, are C to appellant's separate appendix.

the judge stated they had not received any such papers and copies were given to them in court. The record reveals the following:

> THE COURT: The statement that was exhibited to you, Mr. Suarez, indicates that on May 15, 1967 this defendant pled guilty to attempted manslaughter in the second degree, a Class D felony, to cover Indictment No. 609 of 1967. This plea was taken in Bronx County and on June 20, 1967 the defendant was sentenced to five years on this plea by Judge Arthur Markewich. Now, does he admit to this?
>
> (Mr. Suarez conferred with the defendant)
>
> MR. SUAREZ: Yes, Judge.
>
> THE COURT: All right, the defendant admits to this. Defendant is a predicate felon.

Counsel made a plea for a lenient sentence on behalf of the appellant, during which counsel stated that he had represented appellant in the manslaughter case.

The judge then imposed upon appellant a sentence of from seven and one-half to fifteen years in prison as a second felony offender.

On appeal to the Appellate Division, First Judicial Department, appellant asserted that he was deprived of a sentencing proceeding in accord with due process because he was never advised that he had the right to challenge the prior conviction on constitutional or factual grounds. The conviction was affirmed without opinion on March 29, 1976, and leave to appeal to the Court of Appeals was denied on December 30, 1976.

On April 5, 1976, appellant filed a petition for writ of habeas corpus alleging that the sentencing procedure did not comply with due process (Record on Appeal Doc. No. 1). On September 28, 1976, Judge Brieant denied the petition* finding that appellant had waived his right to a hearing and had remained mute at sentencing.

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*The opinion is " B " to appellant's separate appendix.

ARGUMENT

APPELLANT'S SENTENCE AS A SECOND FELONY OFFENDER WAS IMPOSED IN VIOLATION OF DUE PROCESS AND THEREFORE MUST BE VACATED.

Due process requires that a defendant be given reasonable notice and an opportunity to be heard concerning prior felony convictions used to impose a multiple offender sentence. Oyler v. Boles, 368 U.S. 448, 452 (1962). The necessary elements of due process include notice to the defendant of the effect of an admission that the defendant is a prior offender, of his right not to make that admission, and to his right to a hearing under the statute.* Mounts v. Boles, 326 F.2d 186 (5th Cir. 1963). The procedure must also include the opportunity to dispute or explain the prior conviction (United States v. Marshall, 440 F.2d 195 (D.C. Cir.), cert. denied, 400 U.S. 909 (1970); to challenge its constitutional validity (United States v. Clemons, 440 F.2d 205, 208 (D.C. Cir. 1970), cert. denied, 401 U.S. 945 (1971); cf. Burgett v. Texas, 389 U.S. 109, 115 (1967)), or to argue why the conviction should not be used to enhance the punishment, (United States v. Clemons, supra, 440 F.2d at 208).

At the sentencing proceeding in this case, the appellant was asked only "does he admit to this [information]?"

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*New York's second felony offender procedure is included in N.Y.C.P.L. §400.21. The statute appears as an appendix to this brief.

The record shows he was not told by the judge that he might controvert or mitigate the prior felony information.* He was not told he had the right to remain silent, or to a hearing if he did so. Further, he was not advised that his sentence would be substantially higher as a multiple offender,** or that under New York law a failure to challenge the prior felony on constitutional grounds constituted a permanent waiver of such a challenge.***

Not only was there nothing on the record in this case to demonstrate that appellant was notified of what information he could present to the sentencing judge or of the effect of his admission, the petitioner alleged that he was never advised of his rights. On a liberal interpretation of this pro se petition, Darr v. Burford, 339 U.S. 200, 204 (1950), the allegation necessarily means that he was not advised of the import of an admission or of his rights by anyone, including counsel.

In this case, the record supports the assertion in the petition. At the plea proceedings, no mention was made of the possibility of a multiple offender sentence. Further, although counsel knew of the prior conviction, he apparently was unaware of the state's intent to file a multiple offender information.

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*The statute requires an opportunity not merely to admit, but to controvert.

**Under McKinney's N.Y. Penal Law §70.06 the sentence could be a maximum of from six to fifteen years and a minimum of one-half the maximum term imposed.

***See McKinney's N.Y.C.P.L. §400.21(3),(8)(1971)(pocket part).

He did not receive a copy of it until in court at the sentence procedure. Without notice that the state would seek a higher sentence based on the prior conviction counsel may have believed that it was unnecessary to advise appellant about the impact of an admission or the rights attendant on a multiple offender proceeding. When the state finally served its information there was an in-court conference between appellant and his counsel. However, there was no indication of the contents of that conference. If there had been no earlier discussion about the critical matters, it does not seem possible that at a conference held in the courtroom just as the judge was about to impose a sentence, counsel could have explained the problems to appellant so that he could have understood them and made an intelligent decision to admit the prior felony with no further statement.

Appellant's factual assertion that he was not advised of his rights supported by a record which shows a lack of opportunity to confer with counsel required a hearing even absent an affidavit from counsel. United States ex rel. Cummings v. McMann, 429 F.2d 1295 (2d Cir. 1970); United States ex rel. Holes v. Mancusi, 423 F.2d 1137, 1142 (2d Cir. 1970).

While cases have held that the presence of counsel and the opportunity to confer with counsel renders the prior felony proceedings valid, such decisions have only occurred when it was clear from the record that the defendant was aware of the effect of admitting the prior felony and of his right to challenge the

conviction on various grounds including its unconstitutionality, so that the failure of the defendant or his counsel to contest the information could be considered a waiver. See United States ex rel. Swiatek v. Mancusi, 446 F.2d 943 (2d Cir. 1971). Thus, in United States ex rel. D'Ambrosio v. Fay, 349 F.2d 957, 962 (2d Cir.), cert. denied, 382 U.S. 921 (1965), this Court expressly found that D'Ambrosio's rights were explained in court, and that it was not asserted in the petition for writ of habeas corpus that counsel has failed to advise D'Ambrosio of the possibility of an increased sentence.

Again, in Oyler v. Boles, supra, 368 U.S. at 453-454, the Supreme Court rejected a claim of inadequate notice where there was no claim that the defendants were unaware of the possible bases for the challenges to the earlier conviction. Here, in contrast to the above cases, the record shows that the court explained nothing to the appellant, and appellant asserted that his attorney explained nothing to him. Thus, there is no basis for presuming an intelligent waiver of appellant's rights.

It may be argued that appellant's attorney was aware of the implications of the plea and of the procedures involved. However, the decision to admit a prior felony and to waive the right to a hearing must be that of the defendant based on an informed decision. Here, the record does not support a knowing waiver, and significantly, it was counsel who stated the prior felony was admitted.

CONCLUSION

For the above-stated reasons, the order of the District Court should be reversed.

Respectfully submitted,

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March 11, 1977

§ 400.21 Procedure for determining whether defendant is a second felony offender

1. Applicability. The provisions of this section govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate felony and may be a second felony offender as defined in section 70.06 of the penal law.

2. Statement to be filed. When information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction. Where the provisions of subparagraph (v) of paragraph (b) of subdivision one of section 70.06 of the penal law apply, such statement also shall set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation set forth in subparagraph (iv) of paragraph (b) of such subdivision.

3. Preliminary examination. The defendant must be given a copy of such statement and the court must ask him whether he wishes to controvert any allegation made therein. If the defendant wishes to controvert any allegation in the statement, he must specify the particular allegation or allegations he wishes to controvert. Uncontroverted allegations in the statement shall be deemed to have been admitted by the defendant.

4. Cases where further hearing is not required. Where the uncontroverted allegations in the statement are sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must enter such finding and when imposing sentence must sentence the defendant in accordance with the provisions of section 70.06 of the penal law.

5. Cases where further hearing is required. Where the defendant controverts an allegation in the statement and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must proceed to hold a hearing.

6. Time for hearing. In any case where a copy of the statement was not received by the defendant at least two days prior to the preliminary examination, the court must upon request of the defendant grant an adjournment of at least two days before proceeding with the hearing.

7. Manner of conducting hearing.

(a) A hearing pursuant to this section must be before the court without jury. The burden of proof is upon the people and a finding that the defendant has been subjected to a predicate felony conviction must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial of the issue of guilt.

(b) A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

(c) At the conclusion of the hearing the court must make a finding as to whether or not the defendant has been subjected to a predicate felony conviction.

8. Subsequent use of predicate felony conviction finding. Where a finding has been entered pursuant to this section, such finding shall be binding upon that defendant in any future proceeding in which the issue may arise.

Added L.1973, c. 277, § 17; amended L.1973, c. 1051, § 19.

1973 Amendment. Subd. 4. L.1973, c. 1051, § 19, eff. Sept. 1, 1973, substituted "70.06" for "60.06."

Effective Date. Section 18 of L. 1973, c. 277 provided that this section is effective Sept. 1, 1973.

CERTIFICATE OF SERVICE

_____, 19

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

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